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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XC726

Final NOAA Procedures for Government-to-Government Consultation with Federally
Recognized Indian Tribes and Alaska Native Corporations

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of Final Handbook.

SUMMARY: In compliance with Executive Order (E.O.) 13175, “Consultation and Coordination with Indian Tribal Governments” (November 6, 2000), the Department of Commerce (Department) adopted a Tribal Consultation and Coordination policy statement. This policy establishes the manner in which NOAA works with Federally recognized Indian Tribes when developing NOAA policies that have Tribal implications. This Handbook is intended to assist NOAA, including its regional and field staff, in conducting effective government-to-government consultations and fulfill NOAA’s obligations under E.O. 13175 and Department Administrative Order 218-8 on Consultation and Coordination with Indian Tribal Governments, and the Department of Commerce Tribal Consultation and Coordination Policy.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or an electronic copy of the final Handbook should be directed to Linda Belton, NOAA Tribal Liaison, NOAA Office of Legislative and Intergovernmental Affairs, U.S. Department of Commerce,

NOAA, 1401 Constitution Ave., NW, Washington, DC 20233, telephone (202) 482-5447, email at Linda.Belton@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

E.O. 13175 states that it is the policy of the United States to ensure “regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications” In addition, E.O. 13175 affirms the unique legal and political relationship between the United States and Indian Tribal governments as set forth in the Constitution of the United States, treaties, statutes, executive orders and judicial decisions; and commits the United States to work with Indian Tribes on a government-to-government basis to address issues concerning Tribal trust resources and Indian Tribal treaty rights. E.O. 13175 also recognizes the right of Indian Tribes to self-government and acknowledges that Indian Tribes exercise inherent sovereign powers over their members and territory. On November 5, 2009, President Barack Obama issued a Presidential memorandum charging Federal agencies with strengthening the government-to-government relationship between the United States and Indian Tribes and engaging in regular and meaningful consultation and collaboration with Tribal officials in the development of Federal policies that have Tribal implications. To achieve these objectives, the Presidential memorandum recommits the Federal agencies to the full implementation of E.O. 13175.

On May 21, 2013, Acting Secretary Rebecca Blank issued a new Tribal Consultation and Coordination Policy for the Department of Commerce (DOC Policy) <http://www.gpo.gov/fdsys/pkg/FR-2013-06-04/pdf/2013-13052.pdf>. The DOC Policy describes

the manner in which the Department works with Tribes on a government-to-government basis when formulating or implementing policies that have Tribal implications. The DOC Policy outlines consultation procedures for all operating units within the Department of Commerce.

This final Handbook of NOAA Procedures for Government-to-Government Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations (Handbook) <http://www.legislative.noaa.gov/tribalrelations.html> responds to President Obama's November 5, 2009, memorandum and the principles expressed in E.O. 13175 and the DOC policy. The Handbook is intended only for NOAA internal management purposes and does not create any right or benefit, substantive or procedural, enforceable against the United States, its agencies, entities, or instrumentalities, its officers or employees, or any other person.

Summary of Comments Received in Response to the Draft Handbook

On June 24, 2013, NOAA published a notice and request for comments on a draft "NOAA Procedures for Government-to-Government Consultation with Federally Recognized Indian Tribes" in the Federal Register (78 FR 37795). In response, NOAA received letters from 10 different entities, with approximately 25 unique comments. A summary of comments received and NOAA's responses to those comments are presented below. The notice also includes comments received from two national webinars held on July 17, 2013, and August 13, 2013.

General Comments and Recommendations

Comment 1: The Handbook should strengthen consultation by requiring a Tribal Liaison in each Line Office and Regional Office.

Response: NOAA will have Tribal Liaisons in all Line Offices. NOAA recognizes that requiring a Tribal Liaison in each region is ideal. However, funding is a significant constraint on

NOAA's ability to commit to this level of staffing. NOAA intends for each region to determine its capacity to provide a Tribal Liaison in accordance with its budget priorities. . NOAA does not adopt this recommendation for the reasons identified, but encourages Regional Offices to establish such a position if warranted.

Comment 2: Tribes should be involved in training NOAA Employees.

Response: NOAA encourages the development of joint training opportunities with Tribes to improve communication and efficiency in the conduct of government-to-government consultations. NOAA will seek to send staff to attend to training to which a Tribe extends an invitation to the extent practicable given existing agency workload responsibilities and resource limitations. In addition, NOAA will make every effort to invite Tribal participation in the development and presentation of in-house training opportunities for NOAA employees. Such in-house training may include: the history of American Indians and Alaska Natives or specific Tribes, cultural protocols, Tribal issues, Tribal governmental structures, and the legal context of Tribal rights and resources. Please send any information regarding training opportunities or related inquiries to Linda Belton, NOAA Tribal Liaison, at Linda.Belton@noaa.gov.

Comment 3: Consultations should begin at the regional level and then move to NOAA Headquarters if necessary.

Response: NOAA agrees. The intent of the Handbook is to encourage and support consultations at a Regional or Line Office level. This will allow the NOAA experts on the ground to provide information and allow regional officials to participate in the consultation. Generally, working relationships between NOAA and the Tribes are developed at the Regional or Line Office level. A consultation may be elevated to Headquarters under unusual circumstances, such as a consultation affecting a nationwide NOAA policy.

Comment 4: The Handbook should emphasize the importance of ongoing communication and information sharing throughout the document.

Response: NOAA agrees and has emphasized the importance of ongoing communications throughout the document.

Comment 5: NOAA should maintain the requirements for communication and information before a consultation.

Response: NOAA agrees to communicate and share information before a consultation to the greatest extent reasonable. The current language in the Handbook is consistent with this approach.

Comment 6: NOAA should create an accountability or elevation mechanism for ensuring the requirements of the Handbook are followed by the Regional and Line Offices.

Response: NOAA anticipates that the Handbook will provide helpful guidance and assist agency personnel in fulfilling their responsibilities under E.O. 13175. Should a Tribe feel that a NOAA Line Office or Regional Office has failed to comply with the requirements of E.O. 13175, it should first contact the responsible Line Office or Regional Office official to make its views clear. The NOAA Tribal Liaisons within each Line Office will periodically assess implementation of the Handbook and share best practices. NOAA does not adopt this recommendation because the Handbook already contains sufficient mechanisms for the elevation of a consultation to Headquarters.

Comment 7: NOAA should identify specific criteria for determining which agency actions are impacting Tribes and require consultation.

Response: NOAA does not adopt this recommendation. E.O. 13175 requires NOAA to maintain an accountable process ensuring meaningful and timely input by Tribal officials in the

development of NOAA policies that have Tribal implications. “Policies that have tribal implications” are defined in section 1 of E.O. 13175. This Handbook provides guidance to Regional Offices and Line Offices in the identification of those policies with Tribal implications. Adding specific criteria to the definition provided in E.O. 13175 could unduly limit categories of activities and undermine the Handbook's utility. NOAA believes it most prudent to allow the Line Offices, Regions, and Tribes to make this determination on a case-by-case basis using the Handbook as a guide. For certain issues (e.g., Endangered Species Act) consultation protocols already exist (e.g., Secretarial Order for American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (SO)) and should already be in use by Line and Regional Offices.

Comment 8: NOAA should work with Tribes and Regional Fishery Management Councils to determine how to build meaningful and effective consultation into the Federal fishery management process.

Response: NOAA strongly encourages Councils to discuss and work with Tribes to address their concerns while developing fishery conservation and management measures under the Magnuson-Stevens Act Fishery Conservation and Management Act (MSA) 16 U.S.C. 1800 et seq. Whenever practicable, Councils should initiate dialogue with Tribes early in the development of fishery management measures. This early communication will provide an opportunity to identify potential impacts on Tribes and Tribal trust resources at the earliest practicable time. Pursuant to E.O. 13175, it is NOAA’s – and not the Councils’ – responsibility to consult with Federally recognized Indian Tribes; the Councils’ early engagement with Tribes will facilitate and enhance NOAA’s rulemaking processes and development of fishery management measures.

Comment 9: NOAA should use regional Tribal organizations in addition to individual Tribal governments to promote efficient consultations.

Response: A Tribe may invite a Tribal organization to participate in a discussion with a Regional or Line Office or even a government-to-government consultation; however, meetings with Tribal organizations are not a substitute for government-to-government consultation with a Federally recognized Tribe (unless the Tribe has specifically delegated authority to represent the individual Tribal government's interest in a particular consultation). Tribal organizations can be effective conduits of information, provide opportunities for informal meetings, and assist the agency in identifying Tribes that may be affected by agency actions.

Comment 10: In Section V, the phrase "Tribal members" should be changed to "Tribal leaders" or "Tribally designated officials."

Response: NOAA has incorporated this suggested change in Section V part C to read "Tribally designated officials."

Comment 11: In Section VI, NOAA should add "ceded lands" to the examples.

Response: NOAA believes any action with Tribal implications related to "ceded lands" is addressed by the example in VI. A. "policy or action that affects Tribes, tribal governments, or a Tribe's traditional way of life."

Comment 12: Section VII has two part "B"s.

Response: NOAA has made the change so that Section VII has only one part "B."

Comment 13: The Handbook should refer to Section 7 consultations under the Endangered Species Act which can result in new Federal policies.

Response: There are many types of actions and consultative activities that may result in new Federal policies. The examples noted in the Handbook are not intended to be exhaustive of

all of the various actions that may require consultation. In addition, with respect to implementation of the Endangered Species Act, NOAA views the Secretarial Order 3206 as controlling internal agency procedures in the first instance, and government-to-government consultation as a component of the Secretarial Order procedures.

Comment 14: Two commenters suggested changes in the title of the Handbook. One suggested “NOAA Procedures for Government-to-Government Consultation with Federally Recognized Tribes.” Another suggested “NOAA Procedures for Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations”.

Response: NOAA has changed the title to “NOAA Procedures for Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations,” which more accurately describes the intent and obligations outlined in this Handbook.

Comment 15: NOAA should consider subsistence schedules in determining the preparation time before government-to-government consultation begins.

Response: NOAA has incorporated this suggested change in Section V part “B.”

Comment 16: NOAA should include “on their lands” after “one or more Indian Tribes.” in the definition of “Policies with Tribal Implications.”

Response: E.O. 13175 governs the implementation of the Handbook and has defined the term “policies with tribal implications.” It is not within the purview of the Handbook to alter the definition in the Executive Order.

Comment 17: The Handbook should include a requirement that all Tribes are contacted by at least two different means prior to assuming the Tribe has no interest in a proposed action.

Response: NOAA does not adopt this recommendation. A Tribe may work with a Region or Line Office to establish a consultation protocol to address its preferred means of

contact.

Comment 18: NOAA should have one integrated consultation process, not one for Tribes and one for Alaska Native Corporations.

Response: The unique legal and political relationship between the United States and Indian Tribal governments identified in E.O. 13175 and President Obama's November 5, 2009, Memorandum and established in treaties, statutes, executive orders, and judicial decisions does not apply to Alaska Native Corporations, which lack any kind of sovereign political status and are not governmental entities. Rather, they are corporate form entities created by the Federal statute. The consultations with Alaska Native Corporations should be and, as described in the Handbook, are different from those for Federally recognized Indian Tribes.

In addition, the Handbook allows the Alaska Regional Office and/or Line Offices to develop consultation protocols with Alaska Native Corporations when the need for any specific procedures to identify and address where the interests of an Alaska Native Corporation and Federally recognized Indian tribe may conflict or coincide. The essence of the trust relationship between NOAA and Federally recognized Indian tribes is NOAA's obligation to ensure the interests of tribes in government-to-government consultation are fully considered, whether by providing separate consultations or joint consultations with an Alaska Native Corporation.

Comment 19: NOAA should provide specific guidance on how disagreements between Alaska Native Corporations and Federally recognized Tribal governments will be resolved during a dual consultation process.

Response: NOAA does not adopt this recommendation. As noted in response to comment 18 above, this Handbook allows the Alaska Regional Office and/or Line Offices to develop consultation protocols with Alaska Native Corporations or Indian Tribal governments,

including joint protocols, to address the Tribal implications of proposed NOAA policies and actions. E.O. 13175 requires NOAA to strengthen the government-to-government relationship between the United States and Indian Tribes and engage in regular and meaningful consultation and collaboration with Tribal officials in the development of Federal policies that have Tribal implications. NOAA does not accept the recommendation that added weight should be given to an entity's views based on relative impact of a policy with Tribal implications. NOAA will consult with Alaska Native Corporations on a basis similar to that for Federally recognized tribes and reflecting the essential distinction between the sovereign governments and Alaska Native Corporations.

Comment 20: NOAA should include additional background information regarding the unique history of Alaska Native Corporations and their obligations to Alaska Natives.

Response: Section VII part E includes a history of Alaska Native Corporations and the Federal obligations to Alaska Natives. Therefore, additional information was not added to the Handbook.

Comment 21: Establish a webpage containing links to all DOC agency actions.

Response: NOAA will continue to explore the practicality of developing such a webpage and will work with the DOC Senior Advisor on communications and consultations processes.

Comment 22: The Handbook should clarify that Tribes need not use the Freedom of Information Act (FOIA) to obtain NOAA records relevant to a government-to-government consultation. In addition, NOAA should revise the Handbook to indicate that Tribal knowledge can be protected from FOIA requests.

Response: NOAA has incorporated this suggested change in section VI part F subsection 4. Culturally Sensitive Information is addressed in the Handbook section VIII. C. It should be

noted, however, that there are situations where NOAA is legally obligated to provide documents to the public in response to a FOIA request.

Comment 23: NOAA should add a reference to the DOC Policy to the Handbook.

Response: The DOC Policy is discussed in the introduction section of the Handbook.

Comment 24: NOAA should add a statement to the Handbook making clear that NOAA cannot be represented by a private entity nor may government-to-government consultations be managed or facilitated by a private entity.

Response: NOAA does not adopt this recommendation. The Handbook provides NOAA with the necessary flexibility to ensure its consultations are as effective as possible. To provide meaningful consultation and coordination, NOAA may need to engage a consultant or expert facilitator to assist with a consultation or to represent NOAA during a government-to-government consultation. However, at all times, an appropriate-level NOAA representative will be present to represent the agency.

Comment 25: On the top of page 9 the terms “Band, Nation, Pueblo, Village, and Community” should be capitalized.

Response: NOAA has incorporated this suggested change.

Authority: Presidential Memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR No. 85, May 4, 1994); E.O. 13175 of November 6, 2000 “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000); Presidential Memorandum of November 5, 2009, “Tribal Consultation” (74 FR 57881, November 9, 2009); Department of Commerce Administrative Order 218-8 and Tribal Consultation and Coordination Policy for the U.S. Department of Commerce, 78 FR 3331 (June 4, 2012).

Dated: November 8, 2013

Mark Schaefer,

NOAA Assistant Secretary for Conservation and Management.

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